IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Louis Fassolla, charged as Louis Fosella,
Plaintiff in Error,

vs.

United States of America,
Defendant in Error.

BRIEF BY PLAINTIFF IN ERROR.

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An examination of the bill of exceptions reveals the following state of facts:

1. The plaintiff in error sold a half gallon of wine to officers of the law. [Tr. p. 19.]

2. The sale took place in the home of the plaintiff in error, which said place, at the said time, was used solely as the dwelling place of the plaintiff in error and his wife. [Tr. pp. 18, 22, 23, 25 and 26.]

3. That a quantity of intoxicating liquor was found in the home and seized and taken by the officers. [Tr. pp. 19 and 26.]

The plaintiff in error stands convicted by a general verdict of guilty upon all three counts of the information herein. The first count alleges the unlawful sale of one-half gallon of wine. The second count alleges unlawful possession of thirty-five gallons of wine, etc. The third count alleges the maintaining of a common nuisance. [Tr. pp. 7 and 9.] It will be conceded by the defendant in error that there was only one sale of intoxicating liquor. Therefore, the defendant in error predicates the first and third counts (sale and nuisance) upon the sale of one-half gallon of wine. The count on possession is predicated upon the wine found and seized in the home of the plaintiff in error.

Plaintiff in error complains that the court erred in in instructing the jury that they should convict him on the counts charging unlawful sale and unlawful possession when the only proof offered was as to one unlawful act, namely, sale. Consideration will be given to each count of the information as the same are presented in the information.

Plaintiff in error submits that the evidence is insufficient to sustain the verdict of guilty on the first count of the information herein, charging sale. An examination of the bill of exceptions will reveal that there is a direct and positive conflict in the evidence as to the sale transaction. It will be observed that the corroborating evidence relied upon by the defendant in error fails. [Tr. pp. 20 to 25.] This conflict in the evidence, viewed in connection with the presumption of innocence which is evidence in favor of the accused,

and in corroboration of his testimony, must lead to the conclusion that the verdict of guilty on the first count of the information herein is absolutely unsustained by the evidence.

The second count alleging unlawful possession is not supported by the evidence and the conviction on the second count of the information herein must be reversed. The fact is undisputed that the liquor which was seized was kept and possessed by the plaintiff in error in his own home and, the presumption must be indulged, legally, for his own use and that of his *bona fide* guests. It is this fact which distinguishes this case from many reported cases in which the liquor was kept in a place of business or some place other than the home or place of dwelling of the accused. Section 33 of article 2 of the National Prohibition Act reads, in part:

> "But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his *bona fide* guests when entertained by him therein."

The burden of proof, which is placed upon the possessor by the same section, was sustained by the plaintiff in error. [Tr. pp. 25 and 26.]

The case of United States v. Crossen, 264 Fed. 459 (Pennsylvania, 1920) is instructive on this point. The court said:

> "It follows that the relator in her petition has established a *prima facie* right to own and possess liquors in the premises in question, because she was not using the premises for the purpose of conducting the saloon but they were occupied by her as her dwelling only. This conclusion is arrived at with some reluctance, because of the provisions of section 3 which prohibit possession except as authorized in the act, and provide for a liberal construction of all its provisions, to the end that the use of intoxicating liquor as a beverage may be prevented. Liberal construction, however, does not justify the court in extending the prohibitive provisions of the act beyond what is plainly stated, nor omitting language which would change its plain meaning. Section 3 prohibits possession 'except as authorized in this act'. Section 33 contains one of the exceptions authorized. Congress has made this exception apply to any one possessing liquor in a private dwelling while used and occupied by him (or her) as his (or her) dwelling, only * * *."

The case of Rose v. United States, 274 Fed. 245, is to the same effect; also United States v. Murphy, 264 Fed. 842.

There is also another ground for the reversal of the conviction on the second count alleging unlawful possession. The plaintiff in error submits that that provision of the National Prohibition Act which declares

the act of possession a crime is illegal and unconstitutional and therefore void. Counsel for the plaintiff in error have carefully read the decision of this court in the case of Page *et al.* vs. United States, 278 Fed. 41, in which the Circuit Court of Appeals, for the Ninth Circuit, holds that the particular provision of the National Prohibition Act is sustainable on the ground that it is necessary for the carrying into execution of the other powers vested by the United States Constitution in the Government of the United States. This raises a quesion that was early discussed and in a masterful way disposed of by Marshall, in the case of McCulloch v. Maryland (4 Wheat. 316). Counsel for the plaintiff in error do not assume the position of questioning the validity or the soundness of the principle declared by the great Chief Justice and as applied to that case such declaration of principle is absolutely unimpeachable. The question for the court to determine is, however, in the last analysis whether the means adopted by Congress are appropriate and adapted to the end sought and whether such means are also consistent with the Constitution and are not prohibited. Starting with this premise, we very earnestly submit that that provision of the National Prohibition Act is unconstitutional and absolutely void. It is elemental that Congress would have no power to declare the possession of intoxicating liquor a criminal act. It has generally been conceded that the mere ownership or possession of intoxicating liquor is not a crime except perhaps in the furtherance of a state monopoly.

(State v. McIntyre, 139 N. C. 599.) The National Prohibition Act manifestly rests upon the Eighteenth Amendment for its validity and constitutional support. The Eighteenth Amendment is absolutely silent in its authorization to Congress to enact any law punishing as a criminal act the mere possession of intoxicating liquor. We contend that Congress had no authority to write into the National Prohibition Act the provision making it criminal to merely possess intoxicating liquor and that the extent of the authority of Congress was to adopt appropriate means to enforce the power given to Congress by the Eighteenth Amendment. We also contend that making possession criminal is not an appropriate means or one plainly adapted to that end, but that it creates substantively a new, separate and distinct offense. We further contend that, tested by the rule laid down by Marshall in McCulloch v. Maryland, the provision is not within the category of "necessary and proper laws" for the reason that the law making the mere possession of intoxicating liquor a crime is prohibited in that Congress has no power in the premises except such as is expressly delegated to it. We submit that the only authority which Congress has to regulate the matter of possession of intoxicating liquor is to declare that possession shall be *prima facie* evidence of the offenses declared illegal by the National Prohibition Act as authorized by the Eighteenth Amendment. This Congress has done in a measure. More than this it has no authority to do.

In the case of United States v. Dowling, 278 Fed. 630, the court said:

> "From the foregoing discussion of these counts it is apparent that the bare possession of intoxicating liquors is all that is charged. No accompanying facts are alleged to show that such possession was unlawful either on account of the time, place or purpose of the possession or of the character of the liquor. The Eighteenth Amendment to the Constitution is in these words:
>
> "'After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation from the United States and all territory subject to the jurisdiction thereof, for beverage purposes is hereby prohibited.'
>
> "This amendment is at once the law forbidding the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, and at the same time it is a grant of plenary power to Congress to enact legislation appropriate for its enforcement. The amendment does not *proprio vigore* provide the means for making it effective; that duty is conferred upon the Congress, and within the scope of the amendment the legislative branch can enact such laws as it may deem proper. Of course the Congress cannot transcend the fundamental law or the delegated power. The amendment does not authorize the Congress to so legislate as to denounce the bare intrastate possession of intoxicating liquors. To do this would be an illegal protrusion. The words, 'for beverage purposes' of the amendment, are as plain and important as any other

words of the amendment, and they are inseparable from the other words. They qualify 'manufacture,' 'sale,' 'transportation,' 'importation,' and 'exportation.'

"However, I think the Congress has the power to prohibit the possession of intoxicating liquors, if the possession is inhibited for the purpose of rendering effective the expressed prohibitions of the amendment; but the Congress cannot do so for the purpose of adding a new prohibited act to the fundamental law. It is clear that the Congress is without authority to make the mere possession of intoxicating liquors—possession stripped of every other fact or incident—a crime. The amendment neither by expression nor implication denounces the simple possession of intoxicating liquors. The possession is lawful unless it be coupled with illegal 'manufacture' or 'sale' or 'transportation' or 'importation' or 'exportation'.

"I am not advised that any court has passed directly upon this question, but I think the decision in U. S. v. Jin Fuey Moy, 241 U. S. 394, loc. cit. 401, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854, is at least persuasive, if not conclusive, of the correctness of the view above advanced. There the court said:

" 'If opium is produced in any of the states, obviously the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime.'

"Of course the Eighteenth Amendment does not apply to opium; but, as it has been said, the amendment does not denounce as unlawful mere possession of intoxicating liquors. nor does the language

> of the amendment authorize the Congress to make the mere possession of intoxicating liquors a crime, as I have attempted to show."

It appears from the second count of the information herein that the defendant in error also seeks to sustain the judgment of conviction upon the one-half gallon of wine which was sold to the officers of the law. [Tr. p. 7.] It therefore appears that the one act of sale predicates the first count and in part the second count and the third count entirely. We have considered the effect of the possession alleged in the second count of the information. The conclusion, which we believe to be sound, is that the possession in the home of the plaintiff in error for his own use and that of his guests was not illegal and therefore the conviction must be reversed.

The next question to which consideration must be given is whether a single illegal act will support a conviction for each of the three counts in the information herein. We submit that it cannot support more than one count. Three counts of the information are supported by the same evidence as to the same single unlawful act and therefore the conviction on one count is a bar to the conviction on the other counts. This raises a question similar to the one raised in the case of Page v. United States, 278 Fed. 41. decided by this court in January, 1922. The facts in the case at bar are clearly distinguishable from the facts in the Page case. In the Page case, there was competent evidence

of *other sales* made on the premises there in question, which premises were the meeting place of a social club. In the case at bar, there is absolutely no evidence of any other sales and the place was the home of the plaintiff in error. This leads to a consideration of what constitutes a nuisance under the National Prohibition Act. This court has already held that a single unlawful act of possession will not support a count charging the maintaining of a common nuisance (Page v. U. S., 278 Fed. 41), and by strong implication held in the same case that a single unlawful sale would not establish the charge of maintaining a common nuisance. This view is that adopted in the case of U. S. v. Schott, 265 Fed. 429. There the court said:

> "Congress had in mind as a possibility what the developed facts of this case show that a defendant charged with the violation of the law might persist in making *further* unlawful sales while awaiting trial. To meet such a situation the Volstead Act declares the place at which such *sales are* made to be a public nuisance, and may be abated, as may any other nuisance. * * *
>
> "The present proceeding is to have such injunction issue. * * * All that is called for is the *prima facie* finding now made that illegal *sales* of liquor have been made at the place complained of as a nuisance, for which the defendant is now under arrest, and that illegal sales have been made at the same place since the arrest * * *."

It clearly appears, therefore, that a common nuisance consists in the maintaining of a place where in-

toxicating liquor is manufactured, sold or bartered in violation of the law. In the case at bar, there is the single unlawful sale. There is no evidence of other sales. There is no evidence that the liquor found on the premises was for the purpose of sale, but, on the contrary, the presumption must be indulged that it was in his home for his own use and the use of his *bona fide* guests as permitted by law, and since in this jurisdiction a presumption of law is considered evidence in the case, it must be held that there were no other sales and that the liquor was not held or possessed except as permitted by law. It is equally untenable to say that the liquor which was found there, as alleged in the second count, would constitute a nuisance for the reason that the keeping must be for sale or for other commercial purpose, and the strict and positive evidence in this case is that the liquor was kept there for his own use and the only evidence to the contrary is that of one sale upon which the first count in the information was predicated. In the case of United States v. One Cadillac Touring Car, 274 Fed. 470. the court said:

> "The contention of the Government that the automobile is subject to forfeiture as a common nuisance under the provisions of section 21 of the National Prohibition Act, * * * is clearly without merit. As it does not appear, and is not alleged by the Government, that intoxicating liquor was manufactured, sold or bartered in said automobile, or kept therein for such a purpose, and the word 'kept' as used in section 21 just quoted,

> refers to keeping for sale or for other commercial purpose."

The United States Supreme Court in the case of Street v. Lincoln Safe Deposit Company, 41 Sup. Ct. Rep. 31 (10 A. L. R. 1548), has given very careful consideration to the question of unlawful possession and the maintaining of a common nuisance. The concurring opinion by Justice McReynolds is enlightening upon the subject of authority granted by the Eighteenth Amendment, wherein he says:

> "The Eighteenth Amendment gave no such power to Congress (virtual confiscation of lawfully acquired liquor.) Manufacture, sale and transportation are the things prohibited—not personal use."

The majority opinion holds that "the word 'kept' plainly means for sale or barter or other commercial purpose."

We submit. therefore, that there is but a single unlawful act in the case at bar. That unlawful act is the alleged sale of one-half gallon of liquor to the officers of the law. That one act will predicate only the count of unlawful sale. There is no evidence of maintaining a nuisance. There is no evidence of unlawful possession, even assuming the constitutionality of the particular provision of the National Prohibition Act. It will be noted that trial counsel for the plaintiff in error saved no exceptions. It is of course well established that the Circuit Court of Appeals will

reverse the record where no exceptions are reserved or proceedings had to correct the error in the District Court in a criminal case, where the life or liberty of a person is at stake and the court will not sit by and allow error to prejudice the rights of an accused even though no technical exceptions are reserved at the time.

Sykes v. U. S., 204 Federal 909;
Humes v. U. S., 182 Federal 485;
Fielder and others v. U. S., 227 Federal 832;
Gillette v. U. S., 236 Federal 215;
Clyatt v. U. S., 197 U. S. 207;
Crawford v. U. S., 213 U. S. 183;
Wiborg v. U. S., 163 U. S. 632;
Pettine v. Territory of New Mexico, 201 Federal 489.

We submit that the judgment of conviction should be reversed as to all of the counts. and we so pray.

Respectfully submitted,

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